

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

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U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

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JAMES L. ZIMMERLY
U.S. DISTRICT COURT

BY _____ DEPT. PLAINTIFF

ELLIS FOSTER, Individually and on Behalf of
the Estate of Eddie Bagby, Jr.

v.

No. 4:99CV733 JWC

LARRY NORRIS, Individually and in His
Official Capacity as Director of the
Arkansas Department of Corrections;
CLIFFORD TERRY, Individually and in His
Official Capacity as Warden of the
Wrightsville Unit; TOMMY ROCHELLE,
Individually and in His Official Capacity
as Administrator of the Boot Camp; SGT.
RICHARD WINTERS, Individually and in
His Official Capacity as Drill Instructor for the
Wrightsville Unit; SGT. JOHN
BROADWAY, Individually and in His Official
Capacity; and the ARKANSAS
DEPARTMENT OF CORRECTIONS

DEFENDANTS

JOY CANADY, as Natural Parent and Next
Friend of Eddie Lynn Deshaun Roderick Jemeal
Bagby, a Minor

INTERVENOR

DEFENDANT BROADWAY'S STATEMENT OF INDISPUTABLE MATERIAL FACTS

Dr. Zimmerly:

1. Dr. James Zimmerly is Board Certified in Preventative Medicine. Ex. 1 at 7.9.
2. Dr. Zimmerly was requested by Plaintiff to render his opinion regarding the cause of Eddie Bagby's death. Ex. 1 at 19.10.
3. Dr. Zimmerly testified as follows:
 - A. I have seen a couple of articles on capsicum spray and asthmatics that I don't have copies of.
 - Q. Did you have an opportunity to review Dr. Erickson's deposition or the medical examiner's file?
 - A. No, only the medical examiner's report. I have not seen any depositions.

* * *

Q. Did you review any articles or publications or treatises to render your opinion?

A. **Not to render my opinion.**

Ex. 1 at 15.11-15.18; 34.4-- 34.6 (emphasis added).

4. Dr. Zimmerly testified as follows:

Q. . . . What is your opinion in this case? What have you been asked to do for the plaintiffs, first, and what is your opinion?

A. To comment on what I believe caused the death. And I have commented in my report. I believe the death was brought about by a number of circumstances, the most important factor being the pepper spray. I believe that the other factors that were listed on the autopsy all contributed. But in the absence of the pepper spray, I don't think any of those other factors would have come into play. Those other factors being his mild asthma, the sickle cell trait and the aspiration of vomitus going into his lungs. In the absence of the pepper spray, the incidents, since it occurred on more than one occasion, I don't think that he would have died. I don't think it would have been even a question.

Ex. 1 at 19.6-20.3.

5. Dr. Zimmerly testified as follows:

Q. What was your understanding with regard to the pepper spray, the first incident?

A. That he stopped after running a distance which I think I have tried to glean from the records in something under -- somewhere in 130 yard run, he stopped and dropped to his knees. And after being told to get up, which he didn't do, he was hit with the first blast of the pepper spray which according to the reports might have been less than a direct face on hit. After that he did get up and moved to another location at which time he sat down. And at some time after he sat down, he got up and walked again and fell down, and was sprayed at least a second time and perhaps a third time. I don't know. But he was sprayed at least twice. After the second episode, he stopped breathing. He was carried into the infirmary.

Exactly where he stopped breathing, I can't tell from the records, whether it was outside or after he got into the infirmary.

* * *

- A. **I think** he was having an asthmatic attack. He had -- as I interpret the evidence, that he had some exercise-induced asthma that caused him to stop the run.

Ex. 1 at 20.4-21.3; 74.6-74.9 (emphasis added).

6. Dr. Zimmerly testified as follows:

- Q. . . . Do you recall when you are reading about the first pepper spray incident, whether it was windy outside?

A. No, I don't.

- Q. Do you recall whether any of the material that you reviewed stated where that pepper spray hit Eddie Bagby, the first spray?

A. My recollection was that it was outside of his head and not on his face.

Ex. 1 at 21.11-21.19.

7. Dr. Zimmerly testified as follows:

- A. . . . [Bagby] still **died due to a combination of several factors** that I mentioned earlier all contributing -- the asthma, the sickle cell trait, and the pepper spray, and the aspiration.

- Q. **Do you know how much pepper spray Mr. Bagby inhaled?**

A. **No.**

Ex. 1 at 26.12-26.19 (emphasis added).

8. Dr. Zimmerly testified as follows:

- Q. Isn't it true, doctor, that not all asthmatics have the same reaction to the same noxious agent?

A. **Yes, that's true.**

Q. It's possible that some asthmatics may have no reaction whatsoever to pepper spray?

A. **That's right.**

* * *

Q. . . . Do you know what the dosage requirements of OC spray would be to cause an asthma attack?

A. My opinion is that **it's not dose related.**

* * *

Q. Were you aware that Eddie Bagby had been sprayed with pepper spray on a previous occasion?

A. I don't know that I knew that.

* * *

A. Now, if you're suggesting that he was sprayed before and he didn't respond, well was he sprayed in the same way? Did he get the same dose? **If you are sensitive**, you are going to have -- you may have an attack and it's not necessarily dose related, but the severity of the attack might be dose related.

Q. The severity of the asthma attack?

A. Well, the severity of the response to the pepper spray. Of course it's going to be dose related.

Ex. 1 at 72.8-72.14; 71.12-71.16; 73.4-73.7; 74.21-75.10 (emphasis added).

9. Dr. Zimmerly testified as follows:

Q. . . . [Y]ou don't have any idea how much pepper spray he actually inhaled, do you?

A. No. **I am not sure** that the quantity makes a big difference. I am willing to recognize that you need to get it into your tracheal broncho tree . . .

Ex. 1 at 32.8- 32.14 (emphasis added).

10. Dr. Zimmerly testified as follows:

Q. If [Bagby] had not had sickle cell trait, would he have died?

* * *

A. **The sickle cell trait certainly insured that he had no chance of survival.** I believe that the pepper spray on top of the asthma independently **could have** resulted in death, **but might not have.**

Ex. 1 at 31.16-31.17 and 32.4– 32.8 (emphasis added).

11. Dr. Zimmerly testified as follows:

Q. Are you familiar with persons with sickle cell trait experiencing sudden death just from exertion?

A. Yes. . . It's a very rare occurrence, but it does happen.

Q: And could it, in fact, have happened in Mr. Bagby's case?

MR. ROWE: What exactly are you saying, could it have happened?

Q. Sickle cell crisis due to sickle cell trait due to exertion.

A. **Anything could have happened, but apparently** running 130 yards and getting short of breath and stopping **ordinarily** would not cause it to happen. A mild asthmatic attack would not ordinarily cause it to happen.

Q. What about the two in conjunction along with the stress of a Department of Corrections boot camp?

A. I don't know how much stress somebody who has been incarcerated in a boot camp which might be stressful, might be comfortable.

* * *

Q. You referenced the Sudden Death in Police Pursuit article which is attached as Exhibit 4 to your deposition.

A. Yes. I would think that that would be an inordinate amount of stress, being chased by the police after you have stolen a car or whatever they were running from the police from. The threat of being caught and going off to jail might be pretty stressful.

* * *

Q. You don't know what stress Mr. Bagby was under that day?

A. No.

Ex. 1 at 40.19-42.9; 42.21-43.8; 44.10-44.12 (emphasis added).

12. Dr. Zimmerly testified as follows:

Q. I'd like to hand you an article from the New England Journal of Medicine. It's a 1987 article that references sickle cell trait as a risk factor for sudden death in physical training.

* * *

Q. Do you know in looking at this paper, this study on sickle cell trait, **where Mr. Bagby would have fallen as far as his risk of death?** Can you look at the tables and discern that. . . . He is a 24 year old black male with sickle cell trait.

A. Relative risk on this table might have been -- well I would have to study this. Let's see. If I am interpreting this correctly, relative risk might have been **27 times** the expected risk.

Q. And which table is that you are referring to?

A. That is Table 2 if I'm interpreting it correctly. Of unexplained death. Well let me continue reading some more of this.

Q. Certainly.

A. And that would include a ratio of a relative risk of 18 times normal for sudden, unexplained death, nine times normal for sudden death, and that amounts to 27 percent increased or a risk ratio for sudden death.

Ex. 1 at 64.10-64.13; 68.20-69.20 (emphasis added).

13. Dr. Zimmerly testified as follows:

Q. You conclude on page 2 in the second full paragraph down in your last sentence that the pepper spray elicited a vomiting response.

A. Yes. That is my opinion. It's not an uncommon result for the pepper spray to elicit a gag response which -- it's a reflex response that can result in vomiting.

Q. And what studies or articles did you review with regard to that?

A. It's just based on my own experience.

Q. Have you had people come in the emergency room that have been pepper sprayed?

A. You bet.

Q. Is that something they do is vomit?

A. They are gagging and the gag response can result in a reflex vomiting. I have treated police officers and their detainees who have been pepper sprayed.

Q. And they gagged?

A. Some of them did.

* * *

Q. Do you recall any information about [Bagby's] physical response to the [second] pepper spray . . .

A. His eyes were closed which again is compatible with a direct spray to the eyes because one of the first things that it causes you to do it causes your eyes involuntarily -- the lids to swell and your eyes to close . . .

Q. Anything else that you recall?

A. No.

* * *

Q. . . . If someone inhales pepper spray, what is the normal response to that inhalation?

A. They start choking and gagging . . .

Q. Did you read in the witness reports any evidence of Mr. Bagby choking, gagging, that sort of thing?

A. **He wasn't responding very much at all . . .**

* * *

Q. Would you expect severe prolonged coughing if you inhale pepper spray?

A. For a few minutes, yes.

Ex. 1 at 45.2-45.21; 23.2-23.16; 26.20-27.11; 75.13-75.15 (emphasis added).

14. Dr. Zimmerly testified as follows:

A. I believe the pepper spray elicited the first episode of reflex vomiting which probably caused the first aspiration.

Q. Did you see any information in the records that would support the fact that the pepper caused the initial aspiration?

A. **I didn't see anything in the record to support that.** I didn't see anything in the record to support that the aspiration occurred after he collapsed. I didn't see anything in the record to support that the aspiration occurred after they started CPR. **I am just telling you my opinion** is based on what is most probable in this case. And **there is nothing in the record to support any one of those three circumstances over any of the others.**

Ex. 1 at 50.16-50.19; 51.8-51.21 (emphasis added).

15. Dr. Zimmerly testified as follows:

Q. I am going to hand you another article . . . entitled Oleoresin Capsicum (Pepper) Spray and "In-Custody Deaths".

* * *

Q. [W]ill you please read [page 190]for the record?

A. However, studies of in vivo human bronchial responses to capsaicin have not demonstrated profound or entirely consistent alterations in pulmonary physiology.

A. Little experimental evidence supports the contention that individuals with hyperactive airways are more susceptible to physiologically significant bronchoconstriction caused by capsaicin exposure.

Q. Okay. So the article, am I correct in stating that it's unknown exactly to what extent pepper spray affects bronchial airways?

A. **That's correct.**

Q. And that is an issue that is currently under study?

A. That is correct . . . [Y]ou can't ignore the fact that in several conclusions in the Dutch Police Force article, they conclude that the respiratory effects of this compound, referring to capsicum, **may be** aggravated in asthmatics. And this is later than those two articles. This is the latest and this is considering all of the evidence and **they are not sure**, but there are several comments where they were concerned that this **could have** deleterious effects on asthmatics and at least one death was blamed due to this.

Ex. 1 at 60.11-60.15; 61.21-63.16 (emphasis added).

16. Dr. Zimmerly testified as follows:

Q. Have you ever worked any cases where pepper spray was considered to be a contributory cause of death?

A. No.

Ex. 1 at 63.17-63.20.

17. Dr. Zimmerly testified as follows:

Q. Okay. Now have you ever studied any particular brands of OC-spray?

A. Have I ever studied it?

Q. Yes, sir.

A. No.

Ex. 1 at 70.21-71.4

18. Dr. Zimmerly testified as follows:

Q. Have you personally conducted any research on the health hazards of pepper spray?

A. No.

Q. Have you personally conducted any research on the health hazards of sickle cell trait?

A. Personally? No.

Ex. 1 at 77.19-78.4.

Dr. Wecht:

19. Doctor Cyril H. Wecht is a medical doctor who specializes in anatomic, clinical and forensic pathology. Ex. 2 at 11.14.

20. Dr. Wecht was requested by Plaintiff to render an opinion as a medical pathology expert regarding the cause of Eddie Bagby's death. Ex. 2 at 15.23.

21. Dr. Wecht testified as follows:

Q. Doctor, if [Bagby] had been exercising and then was experiencing either asthma or bronchial constriction, he would also have hypoxia; is that correct?

A. Well, it would begin to develop.

* * *

Q. [T]o a person with asthma and bronchoconstriction, that in conjunction with exercise would cause a decrease in oxygen?

A. Yes.

* * *

Q. And again, like the first collapse, the hypoxia or asthma could have caused that second collapse, as well?

A. Yes, that's possible.

* * *

Q. What induces sickle cell crisis in someone with sickle cell trait?

A. Usually it's a diminished amount of oxygen in the blood stream that precipitates that. In other words, a state of hypoxia.

Ex. 2 at 29.17-29.23; 30.11-30.15; 60.14-60.20.

22. Dr. Wecht testified as follows:

Q. And the sickle cell crisis, could that have been starting by that point [after the second collapse before the second pepper spray]?

* * *

A. I do not believe that the sickling would have been precipitated by the exercise. . . at the second site, but prior to the second pepper spraying episode, in my opinion, **more probably than not**, sickling had not commenced.

* * *

Q. Now, are there any medical tests that can confirm when the sickling actually began?

A. No, not to my knowledge.

* * *

Q. Did you read the article about sickle cell trait, the high morbidity in basic training. . .?

A. No, **I don't know of such an article.**

Ex. 2 at 53.16-53.18; 57.6-57.8; 57.21-57.25; 58.1-58.4; 58.25-59.7 (emphasis added).

23. Dr. Wecht testified as follows:

A. I don't think the sickling occurred until later because . . . sickle cell crisis is only developed when the individual becomes severely hypoxic. And there's nothing to indicate that he was severely hypoxic prior to the time of the second pepper spraying.

* * *

A. If you have severe hypoxia to the point that you are struggling to breathe, I think probably you might not follow any instructions. . . you're not going to listen to somebody telling you to do this or do that.

Ex. 2 at 61.6-61.15; 26.2-26.6; 26.11-26.13.

24. Dr. Wecht testified as follows:

- A. I think it's medically unjustified and without medical basis to even conjecture that . . . sickling did anything to cause his death. The sickling is definitely an event that occurs after the hypoxia. So . . . **I can't rule out that it may have contributed** in some measure.

Ex. 2 at 67.25-68.14 (emphasis added).

25. Dr. Wecht testified as follows:

- Q. Now, on page ten of your report, you state that the use of pepper spray appears to start a vicious cycle. By this I mean that an asthmatic will develop worse bronchoconstriction and the inflammation response will be increased and of longer duration. Now, can you tell me . . . where you got that information from as far as any supporting literature?

- A. I think it's **probably** to be found in different articles. **I can't tell you specifically** except that **I believe** different articles that have been written regarding pepper spray make such a reference. It . . . would be a quite reasonable inference of a categorical nature, so to speak, that one could draw from discussions of asthma that do not refer to pepper spray, but which refer to inciting agents, compounds, chemicals, and other materials that **may** lead to bronchoconstriction. . . . I think it's not a stretch to include pepper spray among the categories that are referred to as **potential** offensive materials that **can** increase the bronchoconstriction and also lead to a longer asthma attack.

* * *

- Q. Doctor, I'm going to hand you Exhibit Four, which is the toxicological evaluation of pepper spray as a possible weapon in the Dutch police force, **which you have cited** in your report. Specifically, page 314, category human data. Can you please read that first sentence for me.

- A. From an investigation among predisposed individuals such as smokers or asthmatics and controls, it appeared that there was no difference in duration and severity of capsaicin-induced bronchoconstriction.

- Q. So in your opinion is that article incorrect?

- A. In that statement, yes, definitely incorrect.

Ex. 2 at 46.2-47.1; 47.6-47.12; 47.13-48.11 (emphasis added).

26. Dr. Wecht testified as follows:

- A. 15, 16 minutes . . . elapsed during that period of time between the first collapse, what happened there, and then the second collapse immediately prior to the second pepper spray. So that's the medical basis . . . for my opinion . . . that the acute exacerbation [of the asthma] started with the second pepper spray.
- Q. [D]o you know the level of attack that [Bagby] was possibly having at the time of his second [collapse]?
- A. No, **I have no way of knowing that.** I can only go so far as to say that he felt bothered again still more and collapsed. What the level was, I do not know. **Whatever it was, it had not gone away,** causing to collapse a second time.

Ex.2 at 53.1-53.14; 54.1-54.10 (emphasis added).

27. Dr. Wecht testified as follows:

- A. I think this, that [Bagby] very likely was beginning to have some asthma related problems from the emotional and physical stress associated with the events at the boot camp . . . **Maybe** [Bagby] was finding it difficult to catch his breath. The pepper spraying then aggravated the condition . . . some minutes go by and then he . . . is not feeling well. And now the second spray is administered. This then has more severe deleterious effects. . . Now the bronchoconstriction is more severely and significantly aggravated, worsened. The hypoxic state then worsens. It leads then to gagging. It leads to vomiting . . . He loses consciousness then . . .

* * *

- A. Severe gagging and choking can lead to some vomiting.

Ex. 2 at 65.13-65.18; 65.21-24.65; 66.4-66.9; 66.18-66.22; 67.6; 75.3 (emphasis added).

28. Dr. Wecht testified as follows:

- Q. Do you know the dosage requirements of capsicum needed to produce an asthma attack?
- A. No.

* * *

Q. So do you know the concentration of capsicum or oleoresin capsaicin needed to produce an asthma attack?

A. No, I do not.

* * *

Q. Do you know how much exposure to oleoresin capsaicin is required?

A. No. I think to some extent it would be dose related . . . I think the dose, the amount that gets into the oral and nasal passageways would be very important.

* * *

Q. [D]o you know the dose that Eddie Bagby received?

A. No.

* * *

Q. [T]he level of Eddie Bagby's exposure cannot be calculated?

A. Not to my knowledge.

* * *

Q. Would ventilation have a bearing on either dose, exposure or concentration?

A. Well, it could.

Ex. 2 at 75.23-76.1; 76.18-76.22; 77.1-77.9; 77.17-77.19; 78.1-78.3; 78.21-78.24.

29. Dr. Wecht testified as follows:

Q. Have you personally conducted any research on the hazards of pepper spray?

A. No.

Ex. 2 at 83.8-83.11.

Dr. Stopford:

30. Dr. Woodhall Stopford is board certified in Internal Medicine and Occupational Medicine. Ex. 3 at 7.14.

31. The boards as well as the sub-specialty of Occupational Medicine cover Toxicology. Ex. 3 at 8.1

32. Dr. Stopford has been practicing in the area of Occupational Medicine and Environmental Toxicology for approximately 27 years. Ex. 3 at 8.4

33. Dr. Stopford was asked by Plaintiff to look at the toxicological properties and concerns associated with capsicum. Ex. 3 at 8.22

34. Dr. Stopford testified as follows:

Q. Have there been very many controlled clinical studies of pepper spray exposure to humans?

A. **I'm not aware of any . . .** But just looking at spraying in the face, I'm not sure of any - - any study. They've been animal studies, but not - - not human studies.

Ex. 3 at 44.1-44.10 (emphasis added).

35. Dr. Stopford testified as follows:

Q. Have you conducted any animal studies yourself, with regard to health effects of capsaicin or capsicum?

A. No.

Q. Have you reviewed any such studies?

A. I've reviewed reports of them, numerous reports. . . And the ones that are pertinent to my opinion are referenced in my statement.

* * *

Q. What's the relevance of animal studies, with relation to humans?

- A. Well, they give you some determination of biological plausibility . . . **sometimes** when I've ordered animal studies or have asked to have them occur, they're - - **sometimes** you see effects in humans that have also been documented in animal studies.

Ex. 3 at 15.24-16.7; 16.11-16.21 (emphasis added).

36. Dr. Stopford testified as follows:

- A. If you deal with normal animal studies, you can give a lot of capsaicin in the form of pepper spray without closing [bronchials] up. And that's been done in some unpublished studies by at least one spray maker.
- Q. Do you know what spray maker that was?
- A. I want to say - - the one involved in this case.
- Q. Cap-stun?
- A. I think so.
- Q. Okay, do you know what they found?
- A. Yeah, basically I don't think they were able to kill the animals with the spray.

Ex. 3 at 67.23-68.10.

37. Dr. Stopford testified as follows:

- Q. Are any of those articles [you reviewed] relate to those animal [dosage] studies that you just described?
- A. No - I mean, this it the first - - I haven't looked at the studies, no.

Ex. 3 at 70.10-70.15.

38. Dr. Stopford testified as follows:

- Q. [I]n your work studying capsaicin and caps - oleoresin capsicum, what brands of OC were studied? Did you study any particular brand?
- A. Not particularly, no.

Ex. 3 at 17.20-17.22.

39. Dr. Stopford testified as follows:

Q. [In your article that you wrote with Dr. Smith you reference] the death of that twenty-four year old North Carolina man?

A. Correct. . . .

Q. Okay, and were you familiar with First Strike, the OC spray that was used in that case?

A. I can't really tell you. . . . I've looked at some sprays just to see what their characteristics were and spray pattern. . . .

Q. Is a liquid stream worse than a mist? First Strike was a liquid stream. . .

A. You would have increased risk associated with a liquid stream compared to a cone-type spray. . . that will give you a higher exposure to the airways than breathing in an aerosol.

* * *

Q. Okay, and in that 1993 case [the North Carolina man that died], I believe there were several other contributing factors along with the pepper spray exposure?

A. Okay, yeah.

Ex. 3 at 45.19-45.21; 46.1-46.25; 48.6-48.23.

40. Dr. Stopford testified as follows:

Q. Other than the 1993 death with the First Strike stream pepper spray, are you aware of any other deaths that have occurred?

* * *

Q. Doctor, are you aware of any other cases, besides the 1993 North Carolina case, where a medical examiner has determined that pepper spray precipitated and was the cause of death?

A. [N]ot really. . . The ones I've looked at are just part of a number that have been documented as being associated with pepper spray, but **the question is whether they are causal or not. That's a lot harder to determine.**

Ex. 3 at 53.18-54.9 (emphasis added).

41. Dr. Stopford testified as follows:

- A. If you look at asthmatics, directly from the capsaicin studies. . . you can say that asthmatics are more likely to have bronchospasm than normals. And that when they have bronchospasm, it'll be dose dependent.

* * *

- Q. [On] page two of your paper . . . at the very bottom, there was **no difference** in duration or magnitude of bronchial constriction in normal subjects, smokers, and asthmatics. . . .

- A. Yeah, that - - what it says is that - - probably would have been more accurate is that there was no significant difference in the - - if you actually look at the data. . . .

* * *

- Q. [T]he next sentence of you report, it says not all asthmatics are sensitive to [pepper spray's] bronchoconstrictive effects.

- A. That's true. In the Hathaway report . . . seven out of seventeen reacted, so some did not react.

Ex. 3 at 29.6-29.11; 30.13-31.2; 32.7-32.14 (emphasis added).

42. Dr. Stopford testified as follows:

- Q. Do you have any idea how much - - how many people are exposed to pepper spray in a year?

- A. No idea. . . .

* * *

- Q. In your paper, you reference that more than 2,000 public safety agencies now use some form of pepper spray. Do those - - do you know if those agencies actually spray their trainees?

- A. Some do. Some don't.

Ex. 3 at 42.21-42.23; 43.9-43.13.

43. With regard to a study Dr. Stopford personally conducted involving the training and pepper spraying of 6,000 North Carolina Department of Correction officers, Dr. Stopford testified as follows:

Q. [Y]ou have **four of the 6,000** had asthmatic responses. Does that mean an asthma attack?

A. Yes.

Q. Okay, now . . . did any of these people vomit?

A. I don't recall.

Ex. 3 at 50.19-51.10; 52.25-53.5 (emphasis added).

44. Dr. Stopford testified as follows:

Q. What opinions have you developed?

A. The assessments I made . . . [were] that this gentleman had a respiratory arrest after being sprayed in the face with OC spray, at sufficient levels to cause cough. . .

* * *

A. It is my opinion that . . . he was an unusually sensitive individual, . . . that he had respiratory complaints at - - even before he was sprayed, so that he was - - he was in a - - a state where he was having some - - some reaction to the environment - - in this case he was running, so he had exercised into a bronchospasm of some sort, so he was prime for a severe reaction.

* * *

A. And sickling - - it can occur when somebody has sickle cell trait . . . all you have to do is decrease the body's oxygen level and you can get sickling of cells, even in somebody with sickle trait. . . Once he started sickling, there's not - - and there's not a lot you're going to do to keep that guy from dying.

* * *

A. Sickle cell trait can cause a sickle cell crisis in somebody who exercises.

Ex. 3 at 72.20-73.2; 74.18-75.2; 75.12-75.18; 76.1-76.3; 80.20.

45. Dr. Stopford testified as follows:

- Q. Sudden Death in Police Pursuits . . . Did you review all that?
- A. Yes.
- Q. In that case, it was a thirteen year old boy who climbed a fence and ran approximately fifty yards before collapsing?
- A. Correct.
- Q. And then he was diagnosed with sickle cell crisis in sudden death.
- A. Uh-huh
- Q. . . . So this would parallel Mr. Bagby's case?
- A. **It certainly would.** It would be - - you could get very close to it. **Could you get to the point that you're having a sickle cell crisis because of hypoxemia associated with it - - with asthma, enough to kill you? And the answer is yeah, sure.**

Ex. 3 at 81.17-82.19 (emphasis added).

46. Dr. Stopford testified as follows:

- Q. Okay, and with [Bagby's] conditions as found upon autopsy, he could have died absent the pepper spray exposure, couldn't he?
- A. Could you get a sickle cell crisis of somebody who has asthma, and the answer is yes, you could.

Ex. 3 at 97.1-97.5 (emphasis added).

47. Dr. Stopford testified as follows:

- A. **I did not know what to make of the myocarditis. I did not know what to make of the findings of the adrenal glands.**

Ex. 3 at 84.14-84.16 (emphasis added).

48. Dr. Stopford testified as follows:

- Q. Okay, do you have - - know the dosage requirements of Cap-stun that would be needed to produce an asthma attack?

A. No.

Q. Do you know the concentration of Cap-stun that would be needed to produce an asthma attack?

A. I guess the answer is, could I determine that; and the answer is, I probably could.

Q. Okay, have you in this case?

A. No.

* * *

Q. [W]hat exposure to Cap-stun would be needed to produce an asthma attack?

* * *

Q. [H]ave you calculated the level of exposure that Mr. Bagby received on that day?

A. I haven't done any calculations.

Ex. 3 at 84.24-85.8; 86.13; 88.4-88.6 (emphasis added).

Arkansas State Crime Laboratory Medical Examiner Stephen Erickson:

49. Dr. Erickson is board certified in forensic pathology and anatomic and clinical pathology. Ex. 4 at 11.

50. Dr. Erickson performed the autopsy on Eddie Bagby. Ex. 4 at 24.

51. Dr. Erickson testified that Mr. Bagby had adrenalitis: "I haven't seen anything here in the medical literature to indicate that some subtle dysfunctions may occur or may not occur. . . It was there. I can't tell exactly to what point that it affected him or to what exact point it affected the cause of death." Ex. 4 at 46.7.

52. Dr. Erickson further testified:

A. I don't know if [the adrenal gland] was functioning normally. . . The adrenal gland performs a lot of complex functions. And when you have

inflammation of it, it's diseased. And to understand what - - if there was any physiology product of that disease, you would have to run very complex tests while the individual is alive. You can't do it at this point in time; therefore, **I cannot rule [it] out** . . . This is not normal. It's not right . . . the circumstances don't tell me that - - don't allow me to eliminate that. Okay. So I haven't guessed or speculated . . . I felt incumbent to put it in his cause of death, especially since a log of these in-custody pepper spray physical altercation deaths it's stressed over and over and over that underlying health problems can be a major factor in them.

Ex. 4 at 49.18-50.24.

53. Dr. Erickson further testified:

- A. He's got a chronic inflammation in his heart too, which is very disturbing. So there's something going on in Mr. Bagby that hasn't been specifically defined at autopsy involving an inflammatory process present in his heart and his adrenal glands. And something has to explain his behavior just prior to the point of pepper spray administration, why a healthy 23 year old man becomes incapacitated to the point where he does what he did. And because he has these serious medical problems, I'm concluding that **I cannot rule out** that these two things may not have been associated with that.

Ex. 4 at 56.17-57.2.

54. Dr. Erickson testified that, because Mr. Bagby's end capillaries were congested and filled with massive amounts of sickle-cells and because the spleen was packed with those cells he could, to a reasonable degree of medical certainty, conclude that at the time of his death, Eddie Bagby was in a active sickling crisis with all the manifestations that produces. Ex. 4. At 86.10.

55. Dr. Erickson testified as follows:

- A. That's what started the sickle-cell crisis, the lack of oxygen in the cells. . . But what **I can't rule out** is that some sickling had not occurred secondary to the hypoxia due to the exertion. . . I can't tell if or how much sickling had occurred just due to exercise.

* * *

Q. Do you agree with me that sickle-cell trait does not cause shortness of breath?

A. It shouldn't unless you're in a crisis, which then can reduce the amount of blood going to your lungs in those small capillaries.

Ex. 4 at 89.12; 89.20; 90.14;

56. Dr. Erickson testified as follows:

A. [N]othing I've read in the - - about forensic pathology and about autopsies can let me make the statement that if he wasn't pepper sprayed, this stuff wouldn't have happened, because too many things are going on.

* * *

A. I've read nothing that will allow me as the autopsy pathologist to a reasonable degree of medical certainty to establish the extent of pepper spray's involvement. . . nothing I've seen in the microscope or no test I've seen gives me the criteria to be able to quantitate its exact involvement . . .

Q. To a reasonable degree of medical probability with all the physiological conditions, could Mr. Bagby have died **without** pepper spray exposure.

A. **The answer is he could.**

Ex. 4 at 100.24-101.2; 148.7-148.21.

57. Dr. Erickson testified as follows:

Q. So do you know within a reasonable degree of medical certainty whether he ingested pepper spray or not?

A. No. I don't. . .

Q. Do you know whether he breathed it in?

A. No, I don't. . .

Ex. 4 at 112.9-112.14

58. Dr. Erickson testified as follows:

A. This is an individual with sickle-cell, with myocarditis, with adrenalitis, with asthma and pepper spray, and something has caused him to drop out

and come over and not respond to repeated strong requests from a man . . . or a very large authoritarian figure, so in my mind that's strong medical evidence that **something was seriously wrong before . . . before the pepper spray.**

Ex. 4 at 144.5-144.13.

59. Dr. Erickson testified as follows:

Q. [W]ould it be pure speculation on your part to say that pepper spray instigated this whole chain of events that caused Mr. Bagby's death?

A. Yes, that would be a **speculation.**

Ex. 4 at 155.11-155.14.

Other Evidence:

60. Mr. Bagby did not have any physical reaction to the first administration of pepper spray because the wind caught it and it missed his face Ex. 5 at 120.22-24; Ex. 6 at 259.14-17.

61. Mr. Bagby did react to the second spray by slamming his eyes shut and coughing once or twice. Ex. 6 at 278.9-17.

Respectfully submitted,

MARK PRYOR
Attorney General

By:



Michelle Banks Odum, #94135

Assistant Attorney General

323 Center Street, Suite 200

Little Rock, AR 72201-2610

Telephone: (501) 682-1051

Facsimile: (501) 682-2591

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I, Michelle Banks Odum, Assistant Attorney General, do hereby certify that a copy of the foregoing has been delivered to the following on this 26th day of March, 2001:

Mr. Ralph Cloar, Jr.
Prospect Bldg., Suite 640
1501 N. University Ave.
Little Rock, AR 72207-5235
(501) 666-6682
ATTORNEY FOR PLAINTIFF

Via Hand Delivery

3/27

Mr. Timothy A. Rowe
22 E. Washington St., Suite 600
Indianapolis, IN 46204
(317) 632-2524
ATTORNEY FOR PLAINTIFF

Via Overnight Delivery

3/26

Ms. Pamela D. Brogdon
1014 W. Third St.
Little Rock, AR 72201
(501) 376-7772
ATTORNEY FOR INTERVENOR

Via Hand Delivery

3/27



Michelle Banks Odum

q:\civil\michelleo\foster99-733\msj02 facts (broadway)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

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